

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**SAFETY AND ENFORCEMENT DIVISION****Electric Safety and Reliability Branch****San Francisco, California****Date: December 1, 2016****RESOLUTION: SED-3****RESOLUTION**

Resolution SED-3, Establishes Citation Procedures for the Enforcement of Safety Regulations by the Safety and Enforcement Division (SED) Staff for violations of General Orders and other applicable Decisions, Codes, and Regulations regarding communications facilities.

PROPOSED OUTCOME: Staff citation authority permits SED to assess penalties for safety violations which previously required lengthy formal proceedings. A citation program will encourage communications providers to proactively identify and repair violations to avoid penalties, and to self-report potential violations to potentially reduce or avoid penalties.

SAFETY CONSIDERATIONS: Improves infrastructure, worker and public safety by deterring safety shortcuts, misbehavior and illegal conduct.

ESTIMATED COST: Costs of compliance with the safety requirements are unknown.

SUMMARY

On September 29, 2016, the Commission adopted necessary improvements and refinements to the gas and electric safety citation programs in Decision (D.) 16-09-055 (Decision). Specifically, the Decision refined the criteria for Staff to use in determining whether to issue a citation to gas and electric utilities and the amount of the penalty; set an administrative limit of \$8 million per citation issued; adopted detailed criteria for the utilities to use to voluntarily self-report a potential violation, and refined other issues in the program. We endeavor to keep the communications, gas, and electric safety citation programs as similar as possible in structure and process as we adopt necessary improvements and refinements to them, and therefore issue this Resolution to apply the safety citation rules of the Decision to California communications providers.

This Resolution delegates specified authority to the Safety and Enforcement Division Staff, or such other Staff as the Executive Director may be designate (together “Staff”), to

issue citations to communications providers owning or operating communications facilities,¹ in order to enforce compliance with General Orders 95 (*Rules for Overhead Electric Line Construction*) and 128 (*Rules for Construction of Underground Electric Supply and Communication Systems*) and with other applicable communications decisions, regulations, and codes regarding communications facilities. As used herein, “communications facilities” relates to any communication facility covered by GO 95 or GO 128, such as wire, cable, antenna, equipment boxes, support structures, pad-mounted structures, or other equipment which a communication provider attaches or wishes to attach to any utility pole or other support structure used in common with electric, telephone, or other utility providers, as well as with cable television corporations or providers.

The citation program described here delegates to Staff authority to draft and issue citations for violations of General Orders 95 and 128 and other applicable communications decisions, regulations, and codes regarding communications facilities. The Commission delegates to Staff authority to require immediate cure of the cited violations and to levy penalties for violations in the maximum amount prescribed for penalties by Public Utilities Code §§ 2107, 2108, 2111.²

A communications provider’s³ schedule for repairs is irrelevant for purposes of violations; citations may be issued for violations, and penalties levied, regardless of the status of a communications provider’s schedule for repairs.

Pursuant to § 2108, each violation is a separate and distinct offense and ongoing violations are separate and distinct offenses which are not cured until a satisfactory repair is completed. Thus, penalties may be assessed on a daily basis pursuant to § 2108 until a satisfactory repair is made. However, the Commission grants Staff the discretion to assess penalties on less than a daily basis based on consideration of the factors set forth in Appendix A below.

Where applicable, penalty payments are the responsibility of shareholders of the investor-owned communications providers owning communications facilities, and are not to be charged to ratepayers, where applicable.

This Resolution also sets forth the appeal process, as discussed below and in Appendix A.

BACKGROUND

¹ See, e.g. General Order 95, Rule 12, General Order 128, Rule 12, and *Polk v. City of Los Angeles*, 26 Cal. 519 (1945).

² All further section references are to the California Public Utilities Code, unless otherwise noted.

³ As used herein, a “communications provider” means any entity designated as a Communications Service Provider under Public Utilities Code § 9510.5, any facilities-based interconnected Voice over Internet Protocol provider as defined under Public Utilities Code § 239, and any other entity involved in the electronic transmission of information as defined in 47 USC 153(50)-(55).

In D.98-10-058, the Commission amended existing State rules as necessary for California to opt into the regulation of telecommunications-related pole attachments in California, within the federal framework found in 47 USC 224.⁴ D.98-10-058 reflected the Commission's concern with safety, and with harmonizing the rules for electric and communications utilities, in adopting California-specific rules for pole attachments under "Cal. Public Utilities Code §§ 767, 767.5, 767.7, 768, 768.5 and 8001 through 8057."

The Commission has broad regulatory authority, as set forth in Article XII of the California Constitution and § 701 of the Public Utilities Code. Section 701 authorizes the Commission to "supervise and regulate every public utility in the State and [] do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

Section 710(c) provides the Commission "authority [over Voice Internet Protocol Service Providers (VoIP)] relative to access to support structures, including pole attachments, or to the construction and maintenance of facilities pursuant to commission General Order 95 and General Order 128." Accordingly, providers of facilities-based VoIP services are covered by this order and will be included in the citation program.

As mandated in § 702:

Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in this part, or any other matter in any way relating to affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees.

Pursuant to § 451 each public utility in California must:

[F]urnish and maintain such adequate, efficient, just and reasonable service, instrumentalities, equipment, and facilities,... as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

⁴ D.98-10-058 recounted this history:

In 1978, Congress enacted the Pole Attachments Act (47 U.S.C. § 224) which gave the Federal Communications Commission (FCC) jurisdiction to regulate the rates, terms, and conditions of attachments by cable television operators to the poles, conduit or right of way (ROW) owned or controlled by utilities in the absence of parallel state regulation. ... [W]ith the accelerated implementation of competition for telecommunications services, Congress has further addressed and modified federal law pertaining to ROW access rights and obligations. In the Telecommunications Act of 1996 (the "Act") Congress expanded the scope of § 224 to include pole attachments by telecommunications carriers. It also gave the FCC the authority to regulate nondiscriminatory access to poles, ducts, conduits and ROW. n5 As amended by the Act, § 224 provides that "a utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."

Indeed, the Commission has stated that “[t]he duty to furnish and maintain safe equipment and facilities is paramount for all California public utilities.”⁵

Pursuant to § 2101, the Commission is directed to:

... [S]ee that the provisions of the constitution and the statutes of this State affecting public utilities, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed and that violations thereof are promptly prosecuted and penalties due the state therefor recovered and collected...”

Pursuant to § 768⁶ and other relevant authority, the Commission has adopted, and at various times amended General Order 95 (*Rules for Overhead Electric Line Construction*), General Order 128 (*Rules for Construction of Underground Electric Supply and Communication Systems*) and the precursors to these orders. Additionally, the Commission enforces the Public Utilities Code, and has enacted various decisions and resolutions related to electrical supply and communications facilities.

Section 7 allows the Commission to delegate certain tasks to Commission staff. The Commission may lawfully delegate to its Staff the performance of certain functions, including the investigation of facts preliminary to agency action and the assessment of specific penalties for certain types of violations.⁷ The primary purpose of an effective enforcement program should be to deter misbehavior or illegal conduct by communications providers and other entities subject to Commission jurisdiction thereby ensuring that both the employees of the communications provider and the public it serves are properly protected from the inherent hazards of providing communications services. To increase the effectiveness of the Commission’s safety program, it is reasonable to provide Staff with an additional enforcement procedure to ensure that communications providers adhere to their statutory and service obligations.⁸

The delegated authority we approve today is designed to allow the Commission’s Safety and Enforcement Division (SED) Staff, or such other Staff as the Executive Director may designate, to issue citations as part of their duties in order to help ensure the safety of electric and communication facilities as well as the communications providers’ operating

⁵ D.11-06-017 at 16.

⁶ In relevant part, § 768 provides that the Commission “may, after a hearing, require every public utility to construct, maintain, and operate its line, plant, system, equipment, apparatus, tracks, and premises in a manner so as to promote and safeguard the health and safety of its employees, passengers, customers, and the public. . . The commission may establish uniform or other standards of construction or equipment, and require the performance of any other act which the health or safety of its employees, passengers, customers, or the public may demand.”

⁷ D.09-05-020 at 8.

⁸ The Commission’s jurisdiction to create citation programs is well-established. The CPUC has adopted similar citation programs in several other areas. See Commission Resolutions E-4195 (resource adequacy), ROSB-002 (transportation), UEB-002 (telecommunications), USRB-001 (propane), ALJ-274 (gas), and W-4799 (water and sewer).

practices. Such regulatory authority does not in any way diminish the communications providers' primary responsibility to operate and maintain their facilities in a safe manner.

DISCUSSION

General Orders 95, 128

Pursuant to the requirements of Public Utilities Code §§ 451 and 768, General Order 95 was first adopted in 1941, in D.34884. It prescribes the rules governing the design, construction, and maintenance of overhead electrical supply and communication facilities.

General Order 128 was first adopted in 1967, in D.73195 and D.73462. It prescribes the rules governing the design, construction, and maintenance of underground and pad-mounted electrical supply and communications facilities.

Over the years, these General Orders have been amended several times, and the Commission has promulgated other decisions and regulations related to electrical supply and communications facilities.

The Need to Develop a Communications Safety Citation Program

Our recognition of the need to develop a communications safety citation program in the form proposed here has evolved from what has been learned as a result of the 2007/2008 fires in California and from numerous other examples involving communications providers, some of which are set forth below.

Currently, the Safety and Enforcement Division's Electric Safety and Reliability Branch (ESRB) does not have a specific safety citation program over communications providers with regards to the safety of their overhead and underground systems. Lack of a safety citation program over these systems has led to diminished accountability by pole and communications facility owners and users. ESRB may issue a Notice of Violation to applicable communications providers, but SED has no viable option to ensure rapid implementation in order to mitigate potential risks in a timely manner. As a direct result of this time gap, work orders will often take too long to complete or not be closed out at all. Poles and communications facilities are in the public view on a daily basis. A pole or communications facility, whether overhead or underground, in apparent disrepair erodes the public's confidence in the safety and reliability of the network.

To address these concerns, the Resolution we adopt today authorizes an SED enforcement citation program over communications providers. This Resolution is consistent with the need for SED oversight over potentially hazardous and dangerous design, operation, and maintenance activities, such as the overloading of poles by overhead communications facilities.

The potentially hazardous nature of physical communications networks, and in particular, communications facilities attached to poles jointly used by electric utilities, is not speculative. We are aware of a number of incidents involving communications facility failures, including the following:

- On June 19, 2013, in San Francisco, a bus struck an AT&T overhead communication cable resulting in several injuries and one service disruption.⁹ Under GO 95, Rule 84.4-A6, communications conductors over or across public thoroughfares shall have a clearance of 18 feet above the ground. After conducting an investigation, ESRB determined that at the time of contact the above ground clearance of the AT&T cable was only 13 feet 1 inch. The height of this cable was an immediate safety concern requiring immediate action. With no citation program, ESRB served AT&T with a Notice of Violation giving AT&T 30 days to correct the problem.
- On July 5, 2014, seven poles in the Twenty Nine Palms area, jointly owned by Verizon and Southern California Edison (SCE), broke apart and fell to the ground.¹⁰ After conducting an investigation, ESRB determined that SCE poles were of Grade A construction and had bending safety factors of less than 2.67 before the incident. Per GO 95, Rule 44.3, all wooden poles of Grade A construction are to be either replaced or reinforced before their safety factors have been reduced to less than 2.67.
- ESRB staff conducted a Communications Infrastructure Provider (CIP) audit of Verizon's San Bernardino County facilities over a five-day period beginning August 31, 2015 and ending September 4, 2015.¹¹ Per GO 95, Rule 80.1-A2, Statewide Inspection Requirements mandate that each company develop its own procedures for conducting detailed inspections of their communication lines. These plans are required to contain the following factors: Fire Threat, Terrain, and Location. The audit revealed that Verizon had adopted a 25-year cycle inspection plan for its poles, meaning that a pole would be inspected once every 25 years. This plan included the inspection cycle for poles Verizon owns outright as well as poles it jointly owns with other entities. ESRB determined that this 25-year inspection schedule violated the intent of GO 95 but, without a citation program, staff could not require a revision of this plan. Instead, the Commission would have to open a new Order Instituting Rulemaking or another formal proceeding. This same audit identified numerous violations involving cut and/or low hanging cables, broken cross-arms and abandoned lines that had not been annotated on previous Verizon internal audits. Verizon had annotated vegetation

⁹ Notice of Violation dated June 17th, 2014, CPUID: E20130719-03

¹⁰ Notice of Violation dated February 25th, 2015, CPUID: E20140705-02

¹¹ Audit Report dated October 9th, 2015, CPUID: CA2015-003

growth that was straining existing lines and poles but had taken no corrective action.

- ESRB conducted a similar CIP audit of AT&T on the San Francisco Peninsula in August of 2015.¹² ESRB staff sampled 55 work orders for facilities located in San Mateo County with scheduled completion due dates in 2015. Of those 55 work orders, 27 work orders were open past their completion dates, and six work orders were completed past their due date. This lack of follow up and timely repair exacerbates risks. Had SED possessed the ability to cite communications facilities, it could have directed action to mitigate these risks.

In addition to the incidents involving communications facility failures mentioned above, we know of significant examples of issues with poles and facilities attachments that, although not directly attributable to communications providers, still involve a nexus with communications facilities. Many communications providers share poles and other facilities with electricity providers.¹³

Delegation of Authority to Commission Staff

The Commission finds it is reasonable and necessary to delegate to Staff the ability to issue citations to any communication provider owning or operating communications facilities for violations of General Orders 95, 128 or other related decisions, codes, or regulations applicable to communications facilities. Such authority will significantly expand the enforcement tools available to Staff and should help to ensure prompt correction of potential safety violations.

This Resolution gives Staff the authority to issue a written citation to any communication provider owning or operating communications facilities stating the specific violation, the

¹² CIP Audit of AT&T, dated September 28th, 2015, CPUID: CA2015-07

¹³ Examples of incidents in the past decade involving gas, electrical and communication facility failures include:

- The Southern California Witch, Rice, and Guejito Fires of 2007 caused by broken power lines (I.08-11-007 and I.08-11-007);
- The Malibu Canyon Fire of 2007 which was caused by utility facilities that were overloaded with communications and electricity equipment and collapsed during windy conditions (I.09-01-018);
- The 2011 Acacia Avenue incident in SCE's San Bernardino County service area in which a broken conduit resulted in three fatalities;
- The 2011 North Fork incident in PG&E's Yosemite Division in which two PG&E overhead conductors came into contact because of inadequate clearance, injuring a PG&E employee who was working on them;
- The 2012 Ridgecrest incident in SCE's service area in which a bird caused an overhead conductor to fail, resulting in a child suffering burns;
- The 2012 Whittier incident in SCE's Los Angeles service area in which a power line broke due to a tree growing between the primary lines, resulting in a fatality; and
- The 2012 San Mateo incident in PG&E's Peninsula Division in which an overhead conductor failed due to animal contact, resulting in a fatality.

number of offenses, the amount of the penalty, and information about how to appeal the citation, pursuant to the procedures provided here. This Resolution grants Staff the authority to issue such written citations to augment its existing authority to require that the violation be corrected at, or soon after, the time Staff identifies a violation, notwithstanding any existing schedule for repairs. Each day of an ongoing violation may be penalized as an additional offense.

The Respondent may either pay the penalty or submit a Notice of Appeal. The procedures for issuing citations and for filing a Notice of Appeal are set forth in Appendix A.

Each citation may assess the maximum penalty amount provided for by §§ 2107, 2111. Pursuant to § 2108, each violation is a separate and distinct offense and to the extent that a violation is ongoing, each day's continuance is a separate and distinct citable offense. Thus, Staff may assess penalties on a daily basis. However, Staff has the discretion to assess penalties on something less than a daily basis based upon consideration of the factors set forth in Public Utilities Code § 1702.5(a)(1)¹⁴ and Commission Decisions 98-12-075 and 16-09-055. The factors listed in D.98-12-075 encompass all the factors set forth in Public Utilities Code § 1702.5(a)(1) and D.16-09-055, so as to keep the communications, gas, and electric safety citation programs as similar as possible in structure and process. We require Staff to consider the following criteria in determining whether to issue a citation:

- Severity or gravity of the offense, including the following:
 - Economic harm to the victims
 - Unlawful benefits gained by the communications provider
 - Violations that physically harm people or property
 - Violations that threaten physical harm to people or property
 - Harm to the integrity of the regulatory processes, including disregarding a statutory or Commission directive
 - The number of violations
 - The number of consumers affected
- Conduct of the communications provider, including the following:
 - Degree of culpability

¹⁴ Public Utilities Code § 1702.5(a)(1) provides as follows:

“When considering the issuance of citations and assessment of penalties, the commission staff shall take into account voluntary reporting of potential violations, voluntary removal or resolution efforts undertaken, and prior history of violations, the gravity of the violation, and the degree of culpability.”

- Actions taken to prevent a violation
- Actions to detect a violation
- Actions to disclose and rectify a violation, including voluntary reporting of potential violations (see also Rule I.G), voluntary removal or resolution efforts undertaken, and the good faith efforts of the communications provider in attempting to achieve compliance, after notification
- Prior history of violations
- Financial resources of the communications provider, including the size of the business
- Totality of the circumstances, including the following:
 - Establishing a fine that effectively deters further unlawful conduct
 - Consideration of facts that tend to mitigate the degree of wrongdoing or exacerbate the wrongdoing
 - Evaluation of harm from the perspective of the public interest
 - Ensuring that a communications provider does not have incentives to make economic choices that cause or unduly risk a violation
- The role of precedent, including the following:
 - Consideration of previously issued decisions that involve the most reasonably comparable factual circumstances

To reiterate, Staff is not required to issue a citation for each violation it discovers. In appropriate situations, Staff may meet and confer with the communications provider, or take other steps to obtain a cure of the violation and determine that a citation is not necessary. However, regardless of whether a citation is issued, at a minimum, Staff shall document each violation. In the event of an appeal, Staff will be required to explain how it weighed the various factors in reaching its decision on whether to issue the citation and in determining the amount of the penalty.

Payment of a citation or filing an appeal does not excuse the communications provider from curing the violation, nor does it prevent the Commission from taking other remedial measures, including, but not limited to, (i) issuing corrective orders and other compliance orders, such as an expedited order to show cause, and (ii) issuing an order instituting investigation in the event the underlying violation is unresolved or becomes part of a pattern and practice of unresolved violations.

The Commission's regulatory mandate is to ensure that communications providers provide safe and reliable service; authorizing Staff to issue citations is necessary to fulfill that mandate. Consistent with that mandate, the Commission requires that the communications providers correct any violations as soon as feasible, consistent with maintaining a safe and reliable system while prioritizing the safety of the public and

communications provider employees. If the violations cannot be corrected within thirty calendar days, then the Respondent shall submit a detailed Compliance Plan to the Director of SED reflecting the earliest date by which the communications provider can correct the violations. In addition, notwithstanding a Compliance Plan or a repair schedule, penalties may continue to accrue for each day of an ongoing violation until the violation is corrected.

SED is authorized to assess penalties up to the maximum level provided by §§ 2107, 2111 to protect the public interest, as well as to ensure compliance with the Commission's orders and the Public Utilities Code. Staff is directed to take into account the factors listed in Appendix A in issuing citations and assessing penalties and the number of offenses.

Respondents may appeal a citation based on the factors set forth in Appendix A.

To ensure transparency, Staff shall publish citations and appeals on the Commission's website.

The Commission finds merit in harmonizing the communications citation program with the gas and electric citation programs to the extent feasible. Here, we will now require the Commission's Executive Director to designate Commission management at the Deputy Director level or higher (or designee) to issue a citation issued under the communications citation program. We clarify here that if a designee is the signator, the Commission's Executive Director or Division Director shall have made that designation prior to the citation issuing, addressing such instances as when the Director or Deputy Director is on vacation or unavailable, etc.

The gas and electric citation program requires Staff to publish each citation on the Commission's website no later than ten days following service of the citation, and to publish any Notice of Appeal on the Commission's website within ten days of the date the Notice of Appeal is submitted. To conform the communications citation program with the gas and electric safety citation program, we will apply to the communication safety citation program the publication requirement for citations and notices of appeal that is included in the gas and electric safety citation program. In addition, we add to the communications safety citation program the requirement to notify local authorities about the citation as soon as is reasonable and necessary, and no later than ten days after, service of a citation is effected. Nothing in this rule prohibits a communications provider from providing broader notification than the rule requires; for example, notice could be provided to other local officials, pursuant to any request received from a local jurisdiction.

We clarify requirements for a communications provider to respond to a citation so as to harmonize the requirements with the gas and electric safety citation program established in D.16-09-055. First, if a communications provider wishes to appeal a citation, it must do so within 30 days from the date service of the citation is effected. In terms of compliance plans, we reiterate our requirement that immediate safety hazards must be

corrected immediately. Violations that do not constitute immediate safety hazards must be corrected within 30 days after the citation is served. If other violations that do not constitute immediate safety hazards cannot be corrected within 30 days, then the communications provider receiving the citation shall submit a detailed Compliance Plan to the Director of SED within 30 days after the citation is served, unless the communications provider and the Director of the SED, before the expiration of the 30-day period, agree in writing to another date, reflecting the earliest date the corporation can correct the violation. As stated above, we reiterate that penalties may continue to accrue for each day of an ongoing violation until the violation is corrected, notwithstanding a Compliance Plan or repair schedule.

If an appeal is filed, Staff has the burden of proof by a preponderance of the evidence, and once Staff meets its burden, Respondent has the burden to prove any affirmative defenses it might raise.

Nothing in the citation program approved today interferes with the communications provider's requirements to maintain and operate its systems safely, or SED's ability to enforce those requirements, including invoking any necessary emergency response procedures to address immediate safety hazards, or any other procedures necessary to ensure that immediate safety hazards are promptly corrected. To the extent that Staff discovers violations that constitute immediate safety hazards, Staff has existing authority to ensure that those violations are promptly corrected. The citation program approved today is cumulative to all other applicable provisions of state and federal law that provide for sanctions against violators, including but not limited to §§ 2112 and 2113, and does not affect or limit the tort liability of the electric or communications system operator.

The citation program provided for above and in Appendix A hereto applies to communications providers owning or operating communications facilities.

Self-Reporting Provisions

The Commission finds it reasonable and necessary to make communications providers' reporting of self-identified potential violations voluntary. Staff shall consider such voluntary reporting in both deciding whether to issue a citation in the first instance and in determining the amount of any penalties. If such reporting were mandatory, rather than voluntary, such reports might not properly be considered a mitigating factor in whether to issue a citation and in determining an appropriate penalty. A voluntary self-reporting provision is consistent with the specific language in § 1702.5 and D.16-09-055, and fulfills our goal to keep the communications, gas, and electric safety citation programs as similar as possible in structure and process as we adopt necessary improvements and refinements to them.

The appropriate term to define this topic is "self-identified potential violations," because this term reflects the statutory language of § 1702.5 as well as the language in D.16-09-055 and also because the Commission, not the parties, determines what is in fact a violation. We also define a "potential violation" as a potential violation under the

communications citation program; that is, for this program, communications providers may voluntarily self-report potential violations of GO 95, 128 or other related decisions, codes or regulations applicable to communications providers as further limited by the reporting criteria below.

Communications providers would not be allowed to self-report matters which they have already reported to SED. Any self-identified potential violation that meets one or more of the criteria below would be eligible to be reported as a self-identified potential violation, within 30 days of its being identified, if it has not already been reported or otherwise brought to SED's attention by another means. Consistent with D.16-09-055, our adopted criteria for self-reporting in the communications safety citation program are as follows:

- A potential violation that poses a significant safety threat to the public and/or communications provider staff, contractors, or subcontractors.
- A potential violation that caused system wide impacts to the electric grid; caused unplanned power outages of over 48 hours to over 1,000 electricity customers; or caused the electricity provider to activate its emergency response program.
- Any instances of fraud, sabotage, falsification of records and/or any other instances of deception by a communications provider's personnel, contractors, or subcontractors, which caused or could have caused a potential violation, regardless of the outcome.

We emphasize that these self-identification and reporting provisions in no way change or affect any existing reporting requirements. Each communications provider must continue to make records of all potential violations available for review by SED Staff during regular audits or at any time upon the request of SED. Additionally, self-identification and reporting of any potential violation or safety-related condition does not relieve a communications provider of its existing responsibility to correct such violations and safety-related conditions as soon as feasible.

Communications providers may have up to 30 days to report self-identified potential violations after discovering them to allow for the communications provider to investigate the matter and to provide a thorough report. We encourage the communications providers to consult with SED Staff regarding a potential violation as soon as possible, even if it is only an initial cursory report with subsequent official submission. We also emphasize that a 30-day reporting period in no way relieves the communications providers of their duty to implement corrective action and make their facilities safe as quickly as possible.

We give SED the discretion to define and refine the ministerial reporting process (i.e., designating an email address or other web based portal) the communications providers shall use if they self-report potential violations. However, as much as is feasible, SED should develop a ministerial reporting process that is consistent with the reporting process in the gas and electric safety citation programs.

We will not require the communications provider to notify city and county officials of a self-identified potential violation unless Staff requires such notification. If Staff so requires, the communications provider shall notify the city and county officials of a potential violation as soon as reasonable and necessary, and no later than 10 days after Staff gives the communications provider such notice. And regardless of whether a communications provider has notified the local officials of a potential violation, if the communications provider receives a citation, Rule 1.F of the citation rules applies, and the communications provider must notify the city and county officials as soon as is reasonable and necessary, and no later than ten days after service of a citation is effected. It is reasonable for Staff to require that communications providers report self-identified potential violations to city and county officials on a case-by-case basis so that the authorities obtain prompt notification. However, nothing in this rule prohibits a communications provider from providing broader notification than the rule requires, pursuant to any request it might obtain from a local jurisdiction or otherwise.

NOTICE AND COMMENT

A draft of this Resolution was provided to jurisdictional communications providers and other interested parties, including those companies and individuals on the service list of R.14-05-013 (regarding the electric and gas citation program), Petition (P.) 16-05-004 (an SED petition for rulemaking regarding Rule 18 of GO 95), and four proceedings in which various communication infrastructure providers have requested non-discriminatory access to poles and rights-of-way: R.14-05-001, P.16-08-016, P.16-07-009, and R.06-10-005, in accordance with Section 311 of the Public Utilities Code. Comments were allowed under Rule 14.5 of the Commission's Rules of Practice and Procedure.

FINDINGS

1. Decision 16-09-055 was adopted by the Commission on September 29, 2016 to implement necessary improvements and refinements to the gas and electric safety citation programs.
2. We endeavor to keep the communications, gas and electric safety citation programs as similar as possible in structure and process as we adopt necessary improvements and refinements to them.
3. Public Utilities Code § 701 authorizes the Commission to supervise and regulate every public utility in the State.
4. Public Utilities Code § 702 mandates every public utility to obey and promptly comply with every Commission order, decision, direction, or rule.
5. Public Utilities Code §710(c)(7) preserves the Commission's authority relative to the construction and maintenance of support structures and other communications facilities pursuant to General Orders 95 and 128.

6. Public Utilities Code § 2101 directs the Commission to see that the provisions of the State constitution and statutes dealing with public utilities are addressed and obeyed.
7. California law, including Public Utilities Code § 7, authorizes the Commission to delegate certain powers to its Staff, including the investigation of acts preliminary to agency action, and the issuance of citations for certain types of categories of violations up to specified amounts.
8. In determining whether to issue a citation and the amount of the penalty, it is important to ensure that communications providers do not have incentives to make economic choices that cause or unduly risk violations.
9. We strive for a safe physical communications network and want recordkeeping violations, if they exist, to be remedied before any actual harm occurs.
10. As Staff issues more citations, we will develop a body of precedent from which to draw context and compare results, based on comparable factual outcomes and differences in outcomes that are explained.
11. The citation program for communications providers owning or operating communications facilities, as provided for above and in Appendix A, is necessary to ensure effective, prompt, and efficient enforcement of Commission decisions and orders to ensure the public safety.
12. The citation program, as provided for above and in Appendix A, is similar to citation programs previously adopted by the Commission for other industries.
13. The citation program, as provided for above and in Appendix A, is reasonable, and will facilitate achieving compliance with Commission decisions and orders to protect public safety and will help to deter future violations.
14. It is reasonable to authorize Staff to assess penalties for each violation at the maximum amount set forth in Public Utilities Code §§ 2107, 2111; this approach is consistent with the Commission's broad regulatory powers to protect public safety and to ensure compliance with the Commission's orders and the Public Utilities Code.
15. As set forth in Public Utilities Code § 2108, each violation is a separate and distinct offense; to the extent that a violation is ongoing, each day's continuance is a separate and citable offense.
16. Given Public Utilities Code § 2108, it is reasonable to authorize Staff to assess penalties on a daily basis, but Staff shall have the discretion to assess penalties on something less than a daily basis based upon consideration of the factors set forth in Appendix A.
17. We determine the administrative limit of no more than \$8 million for each citation issued under the communications safety citation program in exercising our

discretion with the goal of establishing a robust citation program which ensures that communications providers do not have incentives to make economic choices that cause or unduly risk violations, while providing that the most egregious violations should be presented to the Commission in an Order Instituting Investigation. The Staff has the discretion to either address each violation in a distinct citation or to include multiple violations in a single citation regardless of whether the violations occurred in the same incident or are of a similar nature. If necessary, we can reexamine this limit once the Commission gains experience with it.

18. We do not want potential citation penalties to be factored into the communications provider business model as a mere cost of doing business.
19. The administrative limit we set today is reasonable and achieves the goal of being sufficient enough to ensure that communications providers do not have incentives to make economic choices that cause or unduly risk violations which may lead to a citation. We may also initiate an Order Instituting Investigation for more egregious violations.
20. The communications network citation program should allow a Respondent to appeal Staff-issued citations.
21. We understand that there are small communications providers; however, under our citation programs, SED has the discretion on whether to issue a citation in the first instance and whether to fine for multiple days, by considering various criteria, including the size of the business.
22. Payment of a citation or filing an appeal does not excuse the communications provider from promptly curing cited violations, and does not preclude the Commission from taking other remedial measures.
23. Penalty payments are the responsibility of shareholders of the communications provider owning or operating communications facilities and shall not be charged to ratepayers, where applicable.
24. To the extent that violations are self-identified and self-corrected, and no injury or damage has resulted from these violations, Staff should consider these factors in deciding whether to cite such violations and, if so, in determining the penalty amount.
25. “Self-identified potential violations” is the appropriate term to define problems that may be self reported, because this term reflects the statutory language of § 1702.5, the language in D.16-09-055, and also because the Commission, not the parties, determines what is in fact a violation.
26. We also define a “potential violation” as a potential violation under the communications citation program; that is, for this program, communications providers may voluntarily self-report potential violations of GO 95, 128 or other related decisions, codes or regulations applicable to communications providers.

27. If reporting of self-identified potential violations were mandatory, rather than voluntary, such reports might not properly be considered a mitigating factor in whether to issue a citation and in determining an appropriate penalty.
28. A period of up to 30 days to report self-identified potential violations is reasonable to allow time for the communications provider to investigate the matter and to provide a thorough report. However, we encourage the communications providers to consult with Staff regarding a potential violation as soon as possible, even if it is only an initial cursory report with subsequent official submission.
29. It is reasonable to authorize Staff to require that communications providers report self-identified potential violations to city and county officials on a case-by-case basis so that the authorities obtain prompt notification if Staff believes it necessary.
30. Because other state and federal agencies with jurisdiction have their own notification requirements, we do not impose additional notice requirements for other state or federal agencies in this program.
31. Nothing in the citation program approved today interferes with the requirements for communications providers owning or operating communications facilities to maintain and operate their systems safely, including invoking any necessary emergency response procedures to address immediate safety hazards, or any other procedures necessary to ensure that immediate safety hazards are promptly corrected.
32. To the extent that Staff discovers violations that constitute immediate safety hazards, Staff has existing authority to ensure that violations are promptly corrected.

THEREFORE, IT IS ORDERED that:

1. The Commission delegates authority to the Safety and Enforcement Division Staff, or such other Staff as may be designated by the Executive Director, to issue citations to and to levy penalties against communications providers owning or operating communications facilities to enforce compliance with General Orders 95, 128, and other related applicable decisions, codes, or regulations.
2. The Commission's Executive Director shall designate Commission management at the Deputy Director level or higher (or designee) to issue a citation issued under the communications safety citation program. If a designee is the signator of the citation, the Commission's Executive Director or Division Director shall have made that designation prior to the citation issuing.
3. Staff shall have the authority to issue citations for violations that have occurred both before and after the effective date of this decision. This decision shall govern all communications citations issued on or after the effective date of this decision.

4. The Citation Procedures and Appeals Process set forth in Appendix A are adopted to govern the issuance and appeal of citations to communications providers for violations of the laws referenced in Ordering Paragraph 1 above.
5. Penalty payments for citations issued pursuant to the communications citation programs are the responsibility of shareholders of the cited communications provider and must not be recovered in rates or otherwise directly or indirectly charged to ratepayers, where applicable.
6. Communications providers owning or operating communications facilities must cure any cited violation as soon as feasible as determined by the Safety and Enforcement Division.
7. Payment of the penalty or submitting a Notice of Appeal does not exempt the communications provider owning or operating communications facilities from curing any cited violation.
8. Violations that constitute immediate safety hazards must be corrected immediately. Violations that do not constitute immediate safety hazards must be corrected within 30 days after the citation is served. If other violations that do not constitute immediate safety hazards cannot be corrected within 30 days, then the communications provider owning or operating communications facilities receiving the citation must submit a detailed Compliance Plan to the Director of the Safety and Enforcement Division (SED) within 30 days, unless the communications provider owning or operating communications facilities and the Director of the SED, before the expiration of the 30-day period, agree in writing to another date, reflecting the soonest that the communications provider can correct the violation.
9. Notwithstanding a Compliance Plan or repair schedule, penalties may continue to accrue for each day of an ongoing violation until the violation is corrected. Penalties will be stayed during an appeal.
10. This Resolution is effective today.

I hereby certify that this Resolution was duly introduced, passed, and adopted by the Public Utilities Commission of the State of California at its regular business meeting held on December 1, 2016. The following Commissioners approved it:

/s/

TIM SULLIVAN
Executive Director

Appendix A**Citation Rules - Procedures and Appeal Process****Applicable to Communication Providers' Facility Violations****I. Citation Procedures****A. Issuance of Citation**

1. The Commission's Safety and Enforcement Division (SED), or other Staff as may be designated by the Executive Director (Staff), has authority under these Rules to issue citations to Respondent communications providers for violations of General Orders 95, 128, or other applicable communications decisions, regulations and codes.
2. Citation to the GOs and other laws in Rule I.A.1 above and in these citation procedures is applicable to any successor applicable codes or regulations which may be adopted or enacted.
3. Staff has the discretion of whether or not to issue a citation in the first instance. Staff shall consider and weigh the following criteria to determine whether or not to issue a citation:
 - Severity or gravity of the offense, including the following:
 - Economic harm to the victims
 - Unlawful benefits gained by the communications provider
 - Violations that physically harm people or property
 - Violations that threatened physical harm to people or property
 - Harm to the integrity of the regulatory processes, including disregarding a statutory or Commission directive
 - The number of violations
 - The number of consumers affected
 - Conduct of the communications provider, including the following:
 - Degree of culpability
 - Actions taken to prevent a violation
 - Actions to detect a violation
 - Actions to disclose and rectify a violation, including voluntary reporting of potential violations (see also Rule I.G below), voluntary removal or resolution efforts undertaken, and the good faith of the communications provider in attempting to achieve compliance, after notification
 - Prior history of violations
 - Financial resources of the communications provider, including the size of the business

- Totality of the circumstances, including the following:
 - Establishing a fine that effectively deters further unlawful conduct
 - Consideration of facts that tend to mitigate the degree of wrongdoing or exacerbate the wrongdoing
 - Evaluation of harm from the perspective of the public interest
 - Ensuring that a communications provider does not have incentives to make economic choices that cause or unduly risk a violation
- The role of precedent, including the following:
 - Consideration of previously issued decisions that involve the most reasonably comparable factual circumstances

The criteria stated above are further defined in Attachment 1, which is an adapted excerpt from Decision 98-12-075, 84 CPUC2d at 155, 193-195:

4. Staff shall determine the penalty for each violation at the statutory maximum as defined by Public Utilities Code §§ 2107, 2111. Staff has the discretion to assess penalties on less than a daily basis (again at the §§ 2107, 2111 statutory maximum). Staff shall weigh the criteria set forth in Rule I.A.3 above in determining the penalty amounts consistent with this framework.
5. The administrative limit for each citation issued pursuant to this citation program is \$8 million. The Staff has the discretion to either address each violation in a distinct citation or to include multiple violations in a single citation regardless of whether the violations occurred in the same incident or are of a similar nature.
6. The Commission's Executive Director shall designate Commission management at the Deputy Director level or higher (or designee) to issue a citation issued under the communications citation program. If a designee is the signator, the Commission's Executive Director or Division Director shall have made that designation prior to the citation issuing.

B. Contents of Citation

1. A specification of each alleged violation, including citation to the portion of General Orders 95, 128, or other decision, code or regulation allegedly violated;
2. A statement of the facts upon which each alleged violation is based. While the citation need not include all supporting evidence, Staff will make the evidence available for timely inspection upon request by the Respondent; see also Rule II.B.4 below;

3. The number of offenses, which may be counted on a daily basis, or something less, depending upon application of the factors set forth in Rule I.A.3 and I.A.4;
4. The penalty assessed for each offense, determined consistent with the factors set forth in Rule I.A.3 and I.A.4;
5. The total amount of the penalty;
6. A statement that the Respondent must, within thirty days of the date of service of the citation, either pay the amount of the penalty set forth in the citation or appeal the citation. The citation shall also inform the Respondent that immediate safety hazards must be corrected immediately; that violations that do not constitute immediate safety hazards must be corrected within 30 days after the citation is served. The citation shall also inform Respondent that if other violations that do not constitute immediate safety hazards cannot be corrected within 30 days, then the Respondent must submit a detailed Compliance Plan to the Director of SED within 30 days after the citation issues, unless the communications provider and the Director of SED, before the expiration of the 30 day period, agree in writing to another date, reflecting the soonest that the Respondent can correct the violations. The citation shall also state that the Respondent will forfeit the right to appeal the citation by failing to do one of these things within 30 days. The citation shall also inform the Respondent that payment of a citation or filing a Notice of Appeal does not excuse the Respondent from curing the violation, that the amount of the penalty may continue to accrue until a Notice of Appeal is filed, and that penalties are stayed during the appeal process;
7. A Citation Payment Form;
8. An explanation of how to file an appeal, including the Respondent's right to have a hearing, to have a representative at the hearing, to request a transcript, to request an interpreter, and a copy of or electronic reference to Resolution ALJ-299 Establishing Pilot Program Citation Appeal and General Order 156 Appellate Rules (Citation Appellate Rules); and
9. A form for filing the appeal, which will be called a "Notice of Appeal".

C. Service of Citation

1. Service of the citation shall be effected either personally in the field or to an officer of the Respondent by electronic mail or by first-class mail within a reasonable period of time after the discovery of the violation.

2. Citations served by first class mail may be sent to the Respondent's business address, or the address for the service of process the Respondent has on file with the Secretary of State of California.
3. On the same date that Staff serves a citation in the field, Staff shall also serve a copy of citations issued in the field to an officer of the Respondent at the Respondent's business address.
4. Service is effective upon the date the citation is served personally in the field or on the Respondent by electronic mail or first-class mail.
5. No later than ten days following service of the citation, Staff shall publish each citation on the Commission's website. To the extent that a Respondent submits a Notice of Appeal of the Citation, Staff shall publish that Notice of Appeal on the Commission's website within ten days of the date the Notice of Appeal is submitted.

D. Response to Citation

1. Violations that constitute immediate safety hazards must be corrected immediately. Violations that do not constitute immediate safety hazards must be corrected within 30 days after the citation is served. If other violations that do not constitute immediate safety hazards cannot be corrected within 30 days, then the Respondent must submit a detailed Compliance Plan to the Director of the SED within 30 days after the citation is served, unless the communications provider and the Director of SED, before the expiration of the 30 day period, agree in writing to another date, reflecting the soonest that the Respondent can correct the violations. The Compliance Plan must provide a detailed description of when the violation will be corrected, the methodology to be utilized, and a statement supported by an declaration from the Respondent's Chief Executive Officer or appropriate designee (CEO Declaration) stating that in the Respondent's best judgment, the time that will be taken to correct the violation will not affect the safety or integrity of the operating system or endanger public safety.
2. If the citation is for a continuing violation, the amount of the penalty may continue to accrue on a daily basis until the violation is corrected, notwithstanding the existence of a Compliance Plan, CEO Declaration, or existing repair schedule.
3. Any CEO Declaration must include:
 - a. The name of the person and that person's position that the Chief Executive Officer relied upon for this declaration, and

- b. An explanation of why the time taken to correct the violation will not affect the safety or integrity of the operating system or endanger public safety.
- 4. Unless otherwise specified, a requirement to “notify Staff” or “serve Staff or the Director of SED” means to send a written communication by first-class mail or an express mail service to the address specified in the citation.
 - a. Such written communications are not filed with the Commission’s Docket Office.
 - b. Staff may specify an e-mail address in order to allow electronic submissions in addition to, or instead of communications by mail service.

E. Payment of Penalty or Default

- 1. All cited violations must be cured, as set forth in Rule I.D.1. Payment of penalties must be submitted to the Commission’s Fiscal Office, 505 Van Ness Avenue, San Francisco, CA 94102, in the form of certified check, payable to the California Public Utilities Commission.
 - a. The Respondent must include the citation number and shall include a completed Citation Payment Form.
 - b. Upon payment, the penalty will be deposited in the State Treasury to the credit of the State General Fund.
- 2. If Respondent pays the full amount of the penalty within the time allowed, the citation shall become final.
- 3. Failure to pay the full amount of the penalty or to file a Notice of Appeal will place Respondent in default, the citation shall become final, and the Respondent will have forfeited its right to appeal the citation.
- 4. A late payment is subject to a penalty of 10 percent per year, compounded daily and to be assessed beginning the calendar day following the payment-due date.

F. Notification of Local Authorities

As soon as is reasonable and necessary, and no later than ten days after service of a citation is effected, each Respondent communications provider must notify the Chief Administrative Officer or similar authority in the city and county where the violation occurred for which the citation is issued, and within ten days of such notification must notify the Director of SED that the local authorities have been notified by serving an affidavit that lists the date of notification and the name and contract information of each local authority so notified.

G. Self-Identified and Self-Corrected Potential Violations

1. To the extent that a communications provider voluntarily self-identifies a potential violation pursuant to the criteria set forth in this Rule, Staff shall consider such facts, in addition to those factors set forth in Rules I.A.3 and I.A.4 above, in determining whether a citation should be issued and the amount of the penalty if a citation is issued.
2. If a communications provider voluntarily provides notification of such potential violations to Commission Staff under this Rule, it must do so within 30 days of self-identification of the potential violation. The notification of the self-identified potential violation must also state when the violation will be corrected. A communications provider reporting under this Rule is encouraged to consult with SED Staff regarding a potential violation as soon as possible, even if it is only an initial cursory report with subsequent official submission. This 30-day reporting period in no way relieves the communications provider of its duty to implement corrective action and make its facilities safe as quickly as possible.
3. Criteria for voluntary self-reporting potential violations.
 - a. A “potential violation” is a potential violation of GO 95, GO 128, or other related applicable decisions, codes, or regulations; a potential violation that is voluntarily reportable is listed in Rules I.G.3.b below.
 - b. Any self-identified potential violation that meets one or more of the following criteria would be eligible to be voluntarily reported as a self-identified potential violation, within 30 days of its being identified, if it has not already been reported or otherwise brought to SED’s attention by another means. The criteria include:
 1. A potential violation that poses a significant safety threat to the public and/or communications provider staff, contractors, or subcontractors.
 2. A potential violation that caused system wide impacts to the electric grid; caused unplanned power outages of over 48 hours to over 1,000 electricity customers; or caused the electricity provider to activate its emergency response program.
 3. Any instances of fraud, sabotage, falsification of records and/or any other instances of deception by a communications provider’s personnel, contractors, or

subcontractors, which caused or could have caused a potential violation, regardless of the outcome.

4. A report of a self-identified potential violation must include information about whether the potential violation has been corrected. If the potential violation has not been corrected before the communications provider report is submitted, the communications provider's self-report must include a plan and schedule for correction.
5. SED has the discretion to define and refine the ministerial reporting process (i.e. designating an email address or other web based portal) that communications providers use to self-report potential violations.
6. A communications provider must provide notice to the local authorities described in Rule I.F above within 10 days after Staff advises the communications provider to notify the local authorities of a potential violation. Within ten days of such notification, a communications provider must notify the Director of SED that the local authorities have been notified by serving an affidavit that lists the date of notification and the name and contract information of each local authority so notified.
7. The self-identification and reporting provisions in this Rule in no way change or affect any existing reporting requirements. Each communications provider must continue to make records of all potential violations available for review by SED Staff during regular audits or at any time upon the request of SED. Additionally, self-identification and reporting of any potential violation or safety-related condition does not relieve a communications provider of its existing responsibility to correct such violations and safety-related conditions as soon as feasible.

H. Definitions:

1. As used herein, "communications facilities" relates to any communication facility covered by GO 95 or GO 128, such as wire, cable, antenna, equipment boxes, support structures, pad-mounted structures, or other equipment which a communication provider attaches or wishes to attach to any utility pole or other support structure used in common with electric, telephone, or other utility providers, as well as with cable television corporations or providers.
2. As used herein, "communications provider" means any entity designated as a Communications Service Provider under Public Utilities Code § 9510.5, any facilities based interconnected Voice over Internet Protocol providers as defined under Public Utilities Code § 239, and any other entity involved in the electronic transmission of information as defined in 47 USC 153(50)-(55), or which attaches communications

facilities to a utility pole or other support structure within the meaning of this Resolution.

II. Appeal

A. Notice of Appeal

1. If Respondent wishes to appeal a citation, Respondent (now Respondent/Appellant) must file a Notice of Appeal with the Commission's Docket Office, pursuant to Resolution ALJ-299, within 30 days from the date service of the citation is effected. Respondent/Appellant must serve the Notice of Appeal on the Commission's Executive Director, the Chief Administrative Law Judge (ALJ) (with an electronic copy to: ALJ_Div_Appeals_Coordinator@cpuc.ca.gov), the General Counsel, the Director of SED, and the Director of the Office of Ratepayer Advocates. Respondent/Appellant must serve the Notice of Appeal on the same day the Notice of Appeal is filed and must file a proof of service to this effect at the same time it files the Notice of Appeal.
2. Filing a Notice of Appeal does not excuse the Respondent/Appellant from curing the violation described in the citation. Pursuant to Resolution ALJ-299, Rule 5 of the Citation Appellate Rules, the Notice of Appeal must state the date of the citation that is appealed and explain with specificity each and every ground for the appeal.

B. Designation of ALJ and Hearing Procedures

1. The Chief ALJ shall promptly designate an ALJ to hear the appeal.
2. The assigned ALJ shall set the matter for hearing promptly. The Respondent/Appellant and Staff will be notified at least ten days in advance of the time, date and place for the hearing. The ALJ may, for good cause shown or upon agreement of the parties, grant a reasonable continuance of the hearing.
3. Pursuant to Resolution ALJ-299, Rule 7 of the Citation Appellate Rules, no later than seven business days after the Notice of Appeal is filed, Staff issuing the citation must file with the Commission's Docket Office a Compliance Filing which includes a complete copy of the citation, including all attachments, which is appealed. The Compliance Filing must be served on the Chief ALJ (with an electronic copy to: ALJ_Div_Appeals_Coordinator@cpuc.ca.gov) and Respondent/Appellant on the same day the Compliance Filing is filed. Staff must file a proof of service to this effect at the same time it files the Compliance Filing.
4. Pursuant to Resolution ALJ-299, Rule 9 of the Citation Appellate Rules, no later than three business days prior to the scheduled hearing on the citation appeal, the parties must exchange all information they intend to introduce

into the record at the hearing which is not included in the citation already filed with the Commission pursuant to Resolution ALJ-299, Rule 7 of the Citation Appellate Rules, unless otherwise directed by the ALJ. The information exchange is not to be filed with the Commission or served upon the ALJ or other decision makers.

5. Any appeal of a citation shall be heard in the Commission's courtroom in San Francisco or Los Angeles, at the discretion of the Commission.
6. Upon a good faith showing of language difficulty, the Respondent/Appellant will be entitled to the services of an interpreter at the Commission's expense upon written request to the assigned ALJ and the Public Advisor's Office not less than five business days prior to the date of the hearing.
7. The Respondent/Appellant may order a transcript of the hearing, and shall pay the cost of the transcript in accordance with the Commission's usual procedures.
8. Staff has the burden of proof by a preponderance of the evidence and accordingly shall open and close the hearing. Respondent/Appellant has the burden to prove affirmative defenses it might raise. The ALJ may, in his or her discretion, alter the order of presentation at the hearing.
9. Respondent/Appellant may be represented at the hearing by an attorney or other representative, but such representation will be at the Respondent's/Appellant's sole expense. Rule 13.6 (Evidence) of the Commission's Rules of Practice and Procedure is applicable.
10. Ordinarily, the appeal will be submitted at the close of the hearing. Upon a showing of good cause, the ALJ may keep the record open for a reasonable period to permit a party to submit additional evidence or argument.

C. Draft Resolution

Pursuant to Resolution ALJ-299, Rules 17 and 18 of the Citation Appellate Rules, the ALJ will issue a draft resolution resolving the appeal expeditiously, and no later than 60 days after the appeal is submitted. The draft resolution will be placed on the first available agenda, consistent with the Commission's applicable rules. Persons may file comments on the draft resolution pursuant to Rule 14.5 of the Commission's Rules of Practice and Procedure.

D. Rehearing

A resolution approved by the Commission is subject to rehearing pursuant to Public Utilities Code Section 1731 and to judicial review pursuant to Public Utilities Code Section 1756.

III. Prohibition on *Ex Parte* Communications

Pursuant to Resolution ALJ-299, Rule 19 of the Citation Appellate Rules, ex parte communications as defined by Rule 8.1(c) of the Commission's Rules of Practice and Procedure, with a decision maker, including any Commissioner, Commissioner advisor, the Chief ALJ, any Assistant Chief ALJ, the assigned ALJ, or the Law and Motion ALJ, are prohibited from the date the citation issued, through the date a final order is issued on the citation appeal.

A final order means the date when the period to apply for rehearing of the Commission resolution on the appeal has expired and no application for rehearing has been filed, or if an application for rehearing is filed, the date when the period to seek judicial review of the decision finally resolving the application for rehearing has passed without any party seeking judicial review; or if judicial review is sought, the date any court cases are finally resolved.

Attachment 1 to Citation Rules - Procedures and Appeal Process Applicable to Communications Providers' Facility Violations

Adapted Excerpt from Decision 98-12-075, 84 CPUC2d at 155, 193-195, Section D.2.b of Appendix B:

(b) Fines

The purpose of a fine is to go beyond restitution to the victim and to effectively deter further violations by this perpetrator or others. For this reason, fines are paid to the State of California, rather than to victims.

Effective deterrence creates an incentive for communications providers to avoid violations. Deterrence is particularly important against violations which could result in public harm, and particularly against those where severe consequences could result. To capture these ideas, the two general factors the Commission uses in setting fines are: (1) severity of the offense and (2) conduct of the communications provider. These help guide the Commission in setting fines which are proportionate to the violation.

i. Severity of the Offense

The severity of the offense includes several considerations. Economic harm reflects the amount of expense which was imposed upon the victims, as well as any unlawful benefits gained by the communications provider. Generally, the greater of these two amounts will be used in establishing the fine. In comparison, violations which caused actual physical harm to people or property are generally considered the most severe, with violations that threatened such harm closely following.

The fact that the economic harm may be difficult to quantify does not itself diminish the severity or the need for sanctions. For example, the Commission has

recognized that deprivation of choice of service providers, while not necessarily imposing quantifiable economic harm, diminishes the competitive marketplace such that some form of sanction is warranted.

Many potential penalty cases before the Commission do not involve any harm to consumers but are instead violations of reporting or compliance requirements. In these cases, the harm may not be to consumers but rather to the integrity of the regulatory processes. For example, compliance with Commission directives is required of all California public utilities:

“Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the Commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees.” Public Utilities Code § 702. Section 710(c) preserves the Commission’s “authority relative to access to support structures, including pole attachments, or to the construction and maintenance of facilities pursuant to commission General Order 95 and General Order 128.” Such compliance is absolutely necessary to the proper functioning of the regulatory process. For this reason, disregarding a statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity.

The number of the violations is a factor in determining the severity. A series of temporally distinct violations can suggest an on-going compliance deficiency which the communications provider should have addressed after the first instance. Similarly, a widespread violation which affects a large number of consumers is a more severe offense than one which is limited in scope. For a “continuing offense,” PU Code § 2108 counts each day as a separate offense.

ii. Conduct of the Communications provider

This factor recognizes the important role of the communications provider’s conduct in (1) preventing the violation, (2) detecting the violation, and (3) disclosing and rectifying the violation. The communications provider is responsible for the acts of all its officers, agents, and employees:

“In construing and enforcing the provisions of this part relating to penalties, the act, omission, or failure of any officer, agent, or employee of any public utility, acting within the scope of his [or her] official duties or employment, shall in every case be the act, omission, or failure of such public utility.” Public Utilities Code § 2109.

(1) The Communications provider’s Actions to Prevent a Violation

Prior to a violation occurring, prudent practice requires that all communications provider take reasonable steps to ensure compliance with Commission directives. This includes becoming familiar with applicable laws and regulations, and most critically, the communications provider regularly reviewing its own operations to ensure full compliance. In evaluating the communications provider’s advance efforts to ensure compliance, the Commission will consider the communications provider’s past record of compliance with Commission directives.

(2) The Communications provider’s Actions to Detect a Violation

The Commission expects communications providers to monitor diligently their activities. Where communications providers have for whatever reason failed to meet this standard, the Commission will continue to hold the communications provider responsible for its actions. Deliberate as opposed to inadvertent wrong-doing will be considered an aggravating factor. The Commission will also look at the management's conduct during the period in which the violation occurred to ascertain particularly the level and extent of involvement in or tolerance of the offense by management personnel. The Commission will closely scrutinize any attempts by management to attribute wrong-doing to rogue employees. Managers will be considered, absent clear evidence to the contrary, to have condoned day-to-day actions by employees and agents under their supervision.

(3) The Communications provider's Actions to Disclose and Rectify a Violation

When a communications provider is aware that a violation has occurred, the Commission expects the communications provider to promptly bring it to the attention of the Commission. The precise timetable that constitutes "prompt" will vary based on the nature of the violation. Violations which physically endanger the public must be immediately corrected and thereafter reported to the Commission staff. Reporting violations should be remedied at the earliest administratively feasible time.

Prompt reporting of violations furthers the public interest by allowing for expeditious correction. For this reason, steps taken by a communications provider to promptly and cooperatively report and correct violations may be considered in assessing any penalty.

iii. Financial Resources of the Communications provider

Effective deterrence also requires that the Commission recognize the financial resources of the communications provider in setting a fine which balances the need for deterrence with the constitutional limitations on excessive fines. Some California communications providers are among the largest corporations in the United States and others are extremely modest, one-person operations. What is accounting rounding error to one company is annual revenue to another. The Commission intends to adjust fine levels to achieve the objective of deterrence, without becoming excessive, based on each communications provider's financial resources.

iv. Totality of the Circumstances in Furtherance of the Public Interest

Setting a fine at a level which effectively deters further unlawful conduct by the subject communications provider and others requires that the Commission specifically tailor the package of sanctions, including any fine, to the unique facts of the case. The Commission will review facts which tend to mitigate the degree of wrongdoing as well as any facts which exacerbate the wrongdoing. In all cases, the harm will be evaluated from the perspective of the public interest.

v. The Role of Precedent

The Commission adjudicates a wide range of cases which involves sanctions, many of which are cases of first impression. As such, the outcomes of cases are not usually directly comparable. In future decisions which impose sanctions the parties and, in turn, the Commission will be expected to explicitly address those previously issued

decisions which involve the most reasonably comparable factual circumstances and explain any substantial differences in outcome.

(END OF APPENDIX A)